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Doing Law Beyond the State

Methodological Questions in International and Transnational Legal Theory

*Patrick Capps*¹ and *Richard Collins*²

Over the last two decades the landscape of legal theory has changed dramatically. Well-established assumptions regarding the nature of law have been cast into doubt by a notable expansion in the normative scope and regulative reach of forms of law beyond the state. This has resulted in two distinct, but related, disciplinary shifts. First, analytical legal theory has begun to question seriously its parochial focus, turning its gaze towards global or international legal phenomena. Second, international and European lawyers are beginning to revisit conceptual questions about the nature of their respective fields as conventional disciplinary certainties vanish from view.³ Whilst these shifts have prompted disciplinary self-reflection, a cross-disciplinary dialogue has not yet been well-established. Where legal philosophers have begun to wonder how EU, international and transnational legal phenomena impact on the concept of law, these enquiries are still very much embryonic and often disconnected from the more practical concerns of international and EU lawyers. At the same time, it is clear that international and EU lawyers reflect more on the theory of their discipline than they used to, but there have been relatively few cross-disciplinary conversations about the nature of law, or ‘legality’ in general.

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³ See generally on these developments, Richard Collins, ‘No Longer at the Vanishing Point? International Law and the Analytical Tradition in Jurisprudence’ (2014) 5(2) *Jurisprudence* 265, at 273-75.

It is against this background that this special edition of *Transnational Legal Theory* took shape. The papers in this issue arose out of a workshop at the University of Bristol in January 2014, which was organised by the editors of this special edition. The workshop included contributions by Cormac Mac Amhlaigh (Edinburgh), Jean d'Aspremont (Manchester/Amsterdam), Julie Dickson (Oxford), Jörg Kammerhofer (Freiburg), Michael Giudice (York, Canada), Gleider Hernandez (Durham), Jacob v. H. Holtermann (Copenhagen), Anne van Mulligen (Amsterdam), Henrik Palmer Olsen (Copenhagen), Stuart Toddington (Huddersfield), Ingo Venzke (Amsterdam), Wouter Werner (VU Amsterdam) and Michael Wilkinson (LSE). This workshop, which was funded by the universities of Bristol and Sheffield, arose from a broader project on research methodologies in EU and international law that originated at the University of Sheffield in 2013.

The participants at the workshop were asked to reflect upon the following three questions:

1. How far is it possible to make descriptive claims about the nature of international or transnational law without taking an evaluative position on the function or purpose of each legal order and law more generally?
2. How do (or should) our perceptions of the purpose or nature of legal orders become reflected in legal practice, particularly in international and transnational courts and dispute settlement bodies (eg in textual interpretation or legal opinion)?

3. What do the methodological challenges revealed by doing international and transnational legal research demonstrate about the methodology of legal theory more broadly?

Each of the papers selected for inclusion in this special edition provide answers to one or more of these questions in the course of developing their own distinctive contribution. For instance, the papers by Giudice, Dickson and Collins consider the adequacy of a descriptive-explanatory model based upon the judgments of significance and importance made by officials and participants in international and transnational legal practice. Furthermore, the papers by van Mulligen and Olsen address ways in which international and transnational legal reasoning and practice are influenced by distinctive tensions between instrumental reasoning (pursuing political and moral ends) and the formal requirements of legality and the rule of law. Finally, and most significantly, all the papers explain, in very different ways, how focusing on the specificities of international and transnational legal orders can significantly enhance the explanatory capability of legal theory, just as pertinent methodological debates in jurisprudence can help contribute to a better understanding of what it is to ‘do’ international and transnational legal research.

The opening paper by Julie Dickson explores the possibilities that her approach to method in legal philosophy offers for an explanation of transnational legal phenomena. Her methodology, which she calls ‘Indirectly Evaluative Legal Philosophy’, owes a debt to that of HLA Hart and Joseph Raz in the sense that it attempts to articulate the distinctive character of legal phenomena from the point of view of participants within a

legal order. In the course of the discussion, she sets out certain ‘dangers’ to be avoided and ‘desiderata’ to be attained if—to quote Dickson herself—‘our theories of law are to be sufficiently attuned to, and appropriately illuminating regarding, the domain of transnational law’.⁴ Specifically, Dickson warns against two all-too-easy assumptions: that the growing scope and scale of transnational legal phenomena represent an entirely new challenge to legal theory, and that analytical legal philosophy itself has remained largely ignorant or non-cognizant of non-state forms of law. However, she claims that any method that seeks to provide an adequate theoretical account of forms of law outside of the state context must articulate the importance of law in the distinct and diverse contexts it emerges. Dickson claims that her method can achieve this aim, whilst also ensuring that legal philosophers avoid the temptation to prematurely venerate or endorse law’s value in moral terms—a temptation that she believes it is vital to resist.

In his paper, Michael Giudice uses a specific conceptual problem at the heart of EU law—conflicting views as to its ultimate source of validity—in order to critique the adequacy of the method endorsed by many of those in the positivist tradition (such as Raz and, indeed, Dickson). This tradition seeks to elucidate a concept of law that is faithful to the conceptual distinctions drawn by those who administer, or who are subject to, law, and that is sometimes called ‘conceptual analysis’. In doing so, Giudice considers, but ultimately rejects, the philosophical soundness of the legal pluralist conclusion that the ultimate criterion of validity in EU law is simply relative to the viewpoint of participants within each particular legal system. His main conclusion is that conceptual analysis can only ever form the starting point of a theoretical explanation of the nature of law, which thereafter requires what he terms ‘constructive conceptual explanation’. More precisely,

⁴ See Dickson at XXX. [Page number needed]

Giudice argues that the legal theorist cannot shirk his or her responsibility to evaluate and decide upon the respective merits of each of these competing and incommensurable validity claims.

The contribution by Richard Collins pushes this reasoning even further, arguing that a purely descriptive, value-neutral jurisprudence is impossible. His conclusion is propelled by an analysis of one of the most under-theorised yet critically significant explanatory elements of legal conceptual analysis: the legal official. Specifically, the idea that officials accept an ultimate rule of recognition within each particular legal system is seen as crucial to the concept of law. Collins argues that in the absence of a clear explanation and justification as to why the official viewpoint is to be prioritised, the concept of officialdom acts merely as a ‘boot-strapping’ device, allowing legal philosophers to presuppose, rather than justify, the importance of a constitutional hierarchy to the coherence of a legal system. In the absence of such a hierarchy at the international level, public international law appears deficient as a legal system. However, he claims that this conclusion can only follow if legal theorists are explicit about why such a hierarchy is important and, by implication, what purpose it serves. Given that there may well be strong normative reasons for retaining the decentralised, non-hierarchical character of international law, Collins instead concludes that our assumptions about law’s functional purpose must be either scaled back, or else remain focused upon, and contextualised to, particular legal orders.

Picking up on the analytical and normative methods discussed in earlier papers, Anne van Mulligen seeks to both describe and reconstruct the process of ‘deformalisation’ of the international legal order. As he explains, deformalisation describes a set of inter-

related and complex claims, but to locate this term at its most general level, it describes the displacement of formal modes of law ascertainment and reasoning by a more technocratic, managerialist approach, which emphasises law's ability to achieve functional solutions. Despite offering a seemingly depoliticised view of law as an instrument for the achievement of certain objectives, van Mulligen shows how this deformalisation undermines certain republican values underpinning formal legality. He seeks to cut through the often complex claims made in relation to deformalisation by distilling its central element, which is the displacement of *content-independent* techniques of legal reasoning with *content-dependent* techniques. He concludes his argument with the claim that deformalisation is not in itself problematic, as many prominent international legal scholars have held, except in so far as it threatens to destabilise a normatively appropriate balance between these two techniques of legal reasoning.

Although not deploying the same terminology as van Mulligen, a very similar dynamic between formal legal reasoning, and more instrumental modes of reasoning (that attempt to advance moral or political objectives), underpins the discussion of international courts in the paper by Henrik Palmer Olsen. Olsen's starting point is the 'autonomisation' of international courts. Autonomisation refers to the process by which international courts form and sustain an autonomous interpretation of what the law is within their jurisdiction. Olsen suggests that international courts have to be much more nuanced and strategic when developing law that is always sensitive to the political context in which they adjudicate. 'Legal Diplomacy' describes what courts are doing when attending to this sensitivity. And sensitivity to this issue, Olsen argues, is critical to an adequate explanation of the evolution of international courts.

Individually, each of these five papers offer important contributions on topics of contemporary interest in legal philosophy as well as in the theory of international and transnational law. Taken together, however, they represent a more significant attempt to engage mutual learning between these fields. They demonstrate how by focusing on the specificities of international and transnational legal orders it is possible to rethink and potentially enhance the explanatory capability of legal theory. Moreover, the papers show how methodological debates in jurisprudence can help contribute to a better understanding of what it is to 'do' international and transnational legal research.